

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

CYNTHIA D. PERDUM,
Plaintiff,

v.

WELLS FARGO BANK, N.A.,
Defendant.

Case No. 14-cv-02477-HSG

**ORDER DENYING MOTION FOR
VOLUNTARY DISMISSAL WITH
PREJUDICE**

Re: Dkt. No. 54

In this case, Plaintiff Cynthia Perdum alleges that Defendant Wells Fargo Bank, N.A. violated the False Claims Act (“FCA”) by misappropriating funds provided by the United States under the Home Affordable Modification Program (“HAMP”), and by improperly denying her a loan modification for a mortgage under the HAMP program. Wells Fargo moved to dismiss for failure to state a claim, Dkt. No. 37, and Judge James Donato, to whom this case was previously assigned, granted the motion without prejudice on January 5, 2015, Dkt. No. 53. In his order, Judge Donato expressly stated that Perdum would be provided “one last opportunity” to file an amended complaint by January 12, 2015 or else the case would be dismissed with prejudice.” *Id.* at 4.

Rather than amend her complaint by the deadline ordered by Judge Donato, Perdum instead filed a motion to dismiss her complaint without prejudice. Dkt. No. 54. In that motion, Perdum conceded that she could not plead a cause of action under the FCA, but sought dismissal without prejudice so that she could bring a claim under the Financial Institutions Reform, Recovery, and Enforcement Act (“FIRREA”) at a future date. *Id.* Perdum represented that her failure to bring a FIRREA claim in the first place was caused by the ineffective assistance of her counsel. *Id.* at 4. Wells Fargo opposes Perdum’s motion, arguing that this action should be dismissed with prejudice because (1) Perdum failed to comply with Judge Donato’s order; and (2)

any FIRREA claim brought by Perdum would be futile because only the United States has standing to pursue claims under that statute. Dkt. No. 56 at 1-2.

“Federal Rule of Civil Procedure 41(a)(2) allows a plaintiff, pursuant to an order of the court, and subject to any terms and conditions the court deems proper, to dismiss an action without prejudice at any time.” *Westlands Water Dist. v. United States*, 100 F.3d 94, 96 (9th Cir. 1996). “The purpose of the rule is to permit a plaintiff to dismiss an action without prejudice so long as the defendant will not be prejudiced . . . or unfairly affected by dismissal.” *Stevedoring Servs. of Am. v. Armilla Int’l, B.V.*, 889 F.2d 919, 921 (9th Cir. 1989) (citations omitted). When determining prejudice, a district court may consider such factors as the stage of litigation and the moving party’s delay in requesting voluntary dismissal, as well as indications of forum shopping. *See Cent. Mont. Rail v. BNSF Ry. Co.*, 422 F. App’x 636, 638 (9th Cir. 2011) (citing *Westlands Water Dist.*, 100 F.3d at 96; *Kern Oil & Refining Co. v. Tenneco Oil Co.*, 792 F.2d 1380, 1389-90 (9th Cir. 1986)).


In this case, the Court finds that granting Perdum’s motion would result in legal prejudice to Wells Fargo. This is not a case where “a dispute remains unresolved” or where there is simply a “threat of future litigation,” as have been found insufficient grounds for legal prejudice in other cases. *See, e.g., Westlands Water Dist.*, 100 F.3d at 96-97. To the contrary, the dispute between the parties has been resolved. Judge Donato considered Perdum’s FCA claim when deciding Wells Fargo’s motion to dismiss, provided leave to amend, and expressly stated that the action would be dismissed with prejudice absent the filing of an amended complaint by January 12, 2015. Dkt. No. 53. Perdum did not comply with Judge Donato’s order. In other words, dismissal without prejudice would not merely threaten Wells Fargo with future litigation: it would expose Wells Fargo to potential re-litigation of issues *already decided* by this Court. Accordingly, Perdum’s motion to voluntarily dismiss this action is **DENIED**.

Nevertheless, the Court will exercise its discretion to permit Perdum the opportunity to file an amended complaint under FIRREA, to the extent that she can plead a cause of action consistent with the requirements of Rule 11. The amended complaint may not assert any other new claims or add any new defendants. Perdum must file the amended complaint by no later than **30 days** from

the date of this order. Failure to adhere to this deadline will result in dismissal of this action with prejudice.

IT IS SO ORDERED.

Dated: September 14, 2015


HAYWOOD S. GILLIAM, JR.
United States District Judge

United States District Court
Northern District of California